UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA and STATE OF INDIANA, Plaintiffs, v. ATLANTIC RICHFIELD COMPANY and E. I. DU PONT DE NEMOURS AND COMPANY, Defendants.	Case No. 2:14-CV-312-PPS-PRC Judge Phillip P. Simon Magistrate Judge Paul R. Cherry

UNITED STATES' OPPOSITION TO
APPLICANTS' OBJECTION TO MAGISTRATE'S OPINION AND ORDER

INTRODUCTION

Judge Cherry properly denied Applicants' Motion to Intervene, finding it untimely. Cherry Op. at 3–8. Applicants' Motion comes more than two years after this Court entered a final judgment. The case was closed and the parties—relying on that judgment—have long since started performing work. No activity has occurred in this matter since it was closed and there was—and is—nothing to intervene in.

Judge Cherry properly determined that Applicants knew or should have known of their interest in this matter well before they filed their Motion. Applicants had the opportunity to comment on the remedy selected for the residential areas of the USS Lead Site almost five years ago and the opportunity to comment on the proposed consent decree before it became a final judgment more than two and a half years ago. *Id.* at 5–6. Moreover, because intervention now would disturb a consent decree that was painstakingly negotiated and is in the process of being implemented, Judge Cherry properly found that the parties to the Consent Decree would be

unduly prejudiced and that "delay to the remediation endangers public health." *Id.* at 6–7. Finally, Judge Cherry properly determined that Applicants would not be unduly prejudiced by denial and that no unusual circumstances warranted intervention. *Id.* at 7.

While Applicants' interest in the cleanup of their properties is undisputed, the forum for their input is not this inactive, closed case. It is with EPA directly. EPA has solicited and will continue to solicit input from residents on the ongoing cleanup in their neighborhood. EPA did and will continue to operate a hotline, staff a desk at a local elementary school, and deploy experienced community involvement coordinators to the neighborhood. EPA did and will continue to participate in meetings with local community groups.[1]

We therefore respectfully request this Court to affirm Judge Cherry's denial of Applicants' Motion on the basis of untimeliness alone.[2] Cherry Op. at 3–8.

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[1] For past actions identified in this Paragraph, *see* United States' Opposition to Applicants' Motion to Intervene (ECF #24) (December 16, 2016) ("US Oppos.") at Exh. A (Ballotti Dec.) at ¶ 43 (describing incident command at Carrie Gosch Elementary School), *id.* at ¶ 56 (describing hotline); Exh. C (Pope Dec.) at ¶ 10 (describing staffing at Carrie Gosch Elementary School); *id.* at ¶¶ 8–11 (describing Community Involvement Coordinators and their duties at the Site); *id.* at ¶¶ 66, 69, 70, 74, 83, 89–92 (describing community meetings in 2016).

For current and future actions identified in this Paragraph, *see* "*EPA Enhances Communication with East Chicago Residents*," EPA Press Release, May 31, 2017. Attachment 1. Judicial notice of this EPA press release is appropriate. *See Denius v. Dunlap*, 330 F.3d 919, 926 (7th Cir. 2003) (judicial notice of information from National Personnel Records Center website was appropriate); *Laborers' Pension Fund v. Blackmore Sewer Const.*, 298 F.3d 600, 607 (7th Cir. 2002) (judicial notice of information on FDIC website was appropriate).

[2] Because Judge Cherry denied the Motion on the basis of untimeliness alone, he did not need to reach the three other factors involved in evaluating an intervention motion. *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995). Looking at Applicants' intervention as a whole provides an independent basis for denying Applicants' Motion for the reasons set forth in the United States' original Opposition to Applicants' Motion to Intervene (ECF #24) ("Original Opposition"). The United States hereby incorporates by reference into this Opposition our Original Opposition.

ARGUMENT

I. JUDGE CHERRY PROPERLY FOUND APPLICANTS' MOTION UNTIMELY

Applicants' requested relief falls into two categories: review of the adequacy of EPA's "remediation plan" and remedial activities (Items 1, 3, and 4) and review of the adequacy of the Consent Decree (Item 2).[3] Applicants' Motion to Intervene at 4 ("Applicants' Motion").

The "remediation plan" for the USS Lead Site was issued four and a half years ago (November 30, 2012), based on an administrative record that resulted from a well-established process consistent with the Superfund regulations. US Oppos. at Exh. A (Ballotti Dec.) at ¶ 14.o ("Ballotti Dec."). EPA has not issued any proposed modifications to this remediation plan.

The Consent Decree was entered more than two and a half years ago (October 28, 2014), following public notice and comment. The parties have not filed any proposed modifications to the Consent Decree.

A. Judge Cherry Properly Found that Applicants Knew or Should Have Known of their Interest Long Before They Filed Their Intervention Motion

1. Applicants Knew or Should Have Known of their Interest in the Remediation Plan More than Four Years Before They Filed Their Intervention Motion

Applicants assert that Judge Cherry improperly started the "timeliness" clock on judicial intervention with EPA's issuance of remediation plan notices that predated the instant action by two years. Applicants' Objection at 3, 5–6. Applicants dismiss as irrelevant and wholly inadequate these notices and "some community meetings" held by EPA. *Id.* at 3, 5. However,

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[3] Applicants' second request is not phrased in terms of the adequacy of the Consent Decree. Instead, Applicants ask this Court to "[e]nsur[e] that the *remediation plan* covers the entire residential area affected by contamination, as originally contemplated by the *ROD*." Applicants' Motion at 4 (emphasis added). However, the "remediation plan" and the "ROD" are one and the same document. That document sets forth the remedy for the entire residential area of the Site. By contrast, the Consent Decree provides funding for the implementation of the ROD in two, but not all three, of the residential areas of the Site. Therefore, the only possible interpretation of Applicants' second request is a challenge to adequacy of the Consent Decree.

because much of Applicants' requested relief seeks changes to or review of EPA's remediation plan, Applicants' notice of the proposed remediation plan and opportunity to comment on it in 2012 go to the heart of the timeliness of their Intervention Motion. If their challenge to the remediation plan is untimely, surely their Motion to Intervene is also untimely.

Starting in November 2007 and continuing through the issuance of the proposed remediation plan, EPA engaged in extensive outreach to the Calumet community. US Oppos. at 13, n.15. In July 2012, EPA mailed the proposed remediation plan to all residents within two miles of the USS Lead Site. *Id.* at 13. The mailing advised those residents of the date of a public meeting and the dates for submitting written comments. *Id.* The Mayor of East Chicago, the media, and numerous residents attended the July 25, 2012 public meeting. Ballotti Dec. at ¶ 14.k. EPA's notice and outreach prior to and upon issuing the remediation plan were comprehensive and effective. Several residents submitted written comments on the proposed plan. *Id.* at ¶ 14.l. In accordance with CERCLA, 42 U.S.C. § 9617(b), EPA addressed all public comments in issuing the remediation plan. *Id.* at ¶ 14.m.

2. Applicants Knew or Should Have Known of their Interest in the Consent Decree More than Two Years Before They Filed Their Intervention Motion

Applicants likewise assert that Judge Cherry erred in finding that Applicants had notice of their interest in this matter when the Consent Decree was put out for public comment, some two years before their Motion was filed. Applicants' Objection at 6. Judge Cherry was right.

Congress expressly enabled meaningful public participation in the review of CERCLA consent decrees, but also established a time limit on such participation to ensure the prompt commencement of work. 42 U.S.C. § 9622(d)(2). In this case, consistent with CERCLA, the proposed Consent Decree was put out for a 30-day public comment period on September 9,

2014. 79 Fed. Reg. 53,447 (Sept. 9, 2014). In that notice, the United States described the terms of the settlement and invited public comment. *Id.* We did not seek entry until after the public comment period closed.

As Judge Cherry noted, Cherry Op. at 5–6, the United States also supplemented the statutorily-mandated public notice and comment requirements, thus further undercutting Applicants' assertions that they could not have known of their interest in the fall of 2014. EPA and DOJ issued a press release summarizing the key points of the settlement. U.S. Oppos. at 16 (citing Ex. A-5). The settlement was also discussed in a local newspaper. *Id.* (citing Ex. A-6). Shortly after the Consent Decree was entered, EPA mailed a summary of the settlement to all residents within two miles of the Site and notified them of public meetings on the agreement. *Id.* (citing Pope Dec. at ¶¶ 46–47). EPA then held public meetings on November 18 and 19, 2014, at two different facilities within the Calumet neighborhood to explain the settlement and preview the work to come. Pope Dec. at ¶ 47 and Ex. C-17.

Applicants therefore knew or should have known of their interest by no later than the fall of 2014, two years prior to the filing of their Intervention Motion.

3. Notice of Specific Contamination Levels at Individual Properties does not Start the "Timeliness" Clock on Intervention

Applicants assert that Judge Cherry erred by not starting the "timeliness" clock on their Motion when Applicants learned about "the contamination of their *individual* properties," in the fall of 2016. Applicants' Oppos. at 3. The most obvious problem with this approach is that it would create hundreds and possibly thousands of different "starting times" for remedy challenges and judicial intervention in residential cleanup sites.[4] This was not Congress' intent

[4] Ballotti Dec. at ¶¶ 20, 21 (approximately 1076 properties in Zones 2 and 3 alone); *id.* at ¶ 23 (approximately 4,000 properties in EPA's lead-contaminated Jacobsville, Indiana site).

in crafting the Superfund statute. *See Pollack v. U.S. Dep't of Defense*, 507 F.3d 522, 525 (7th Cir. 2007) (noting sites "should be cleaned up as quickly as possible and without interruption by citizen suits"); *City of Bloomington v. Westinghouse Elec. Corp.*, 824 F.2d 531 (7th Cir. 1987) (affirming denial of citizen groups' intervention as untimely because, *inter alia*, it would delay cleanup).

Moreover, such a holding would turn the Superfund site cleanup process on its head. EPA listed the Site on the National Priorities List ("NPL") in 2009. After that, EPA followed the process outlined in its regulations and guidances to evaluate, secure funding for, and start remediation of the Site:

- First, EPA conducted a remedial investigation and feasibility study to broadly identify the nature and scope of the contamination and evaluate remedies. Ballotti Dec. at ¶¶ 14.a–f.
- Second, EPA issued its Record of Decision, selecting the remedy. *Id.* at ¶¶ 14.h–o.
- Third, EPA negotiated a Consent Decree for funding and implementation of the selected remedy for part of the Site. *Id.* at ¶ 18.
- Fourth, EPA used the funding provided by the Consent Decree to begin Remedial Design by collecting thousands of samples from hundreds of individual properties to determine which properties required remediation. *Id.* at ¶ 25.

EPA generally follows this process at NPL sites across the country. It allows EPA to both confirm that a site needs remediating and to secure funding from potentially responsible parties as soon as possible.[5] As a consequence of this process, EPA collects progressively more detailed sampling data as time progresses.

Applicants now claim that knowledge about data generated during Remedial Design (Step Four) is the "starting point" to secure relief both from the terms of the Consent Decree (Step Three) and ultimately the remedy selected (Step Two). But data generated during

[5] This process also preserves limited EPA resources for those sites where viable responsible parties are unavailable to fund or perform the work. *See generally* Memorandum from John Peter Suarez, EPA Assistant Administrator, to EPA Regional Administrators, *Enforcement First for Remedial Action at Superfund Sites* (Sept. 20, 2002) ("EPA has a longstanding policy to pursue 'enforcement first' throughout the Superfund cleanup process.") (*available at* https://www.epa.gov/sites/production/files/documents/enffirst-mem.pdf).

Remedial Design cannot be used to question the adequacy of the mechanism (*i.e.*, the Consent Decree) that provided the funding for the sampling, much less the adequacy of the remedy that triggered the need for the detailed data collection in the first place.

Even if Applicants did not know about the precise contamination levels of their individual properties until 2016, they knew or should have known far earlier than that that their neighborhood had lead contamination. US Oppos. at 13–14. As Judge Cherry found, this was sufficient to put Applicants on notice that their interests were at stake.[6] Cherry Op. at 5.

B. Judge Cherry Properly Found that Allowing Intervention Now Would Prejudice the Parties

Judge Cherry found that allowing Applicants to intervene now to disturb the Consent Decree "would be highly prejudicial to the parties, who have already negotiated, settled, and

[6] The cases Applicants cite in their Reply Brief as alleged support for the timeliness of their intervention here are not in point. *City of Bangor v. Citizens Commc'ns Co.* Civ. No. 02-183-B-S, 2007 WL 1557426, * 2–3 (D. Maine 2007) *aff'd on other grounds, City of Bangor v. Citizens Commc'ns Co.*, 532 F.3d 70 (1st Cir. 2008) (no EPA involvement and no record of decision; state intervention was timely in an ongoing and active private party cost recovery case to enable state to participate in a settlement that resolved the case and would "result in a single consolidated remediation of the site," instead of potentially different remediation orders being issued); *United States v. Alcan Aluminum, Inc.*, 25 F3d 1174, 1181–83 (3rd Cir. 1994) (intervention by potentially responsible parties ("First PRPs") was timely in a CERCLA enforcement case against other PRPs ("Second PRPs") because the First PRPs filed their motion during the public comment period on the proposed consent decree with the Second PRPs; the proposed Consent Decree appeared to conflict with the First PRPs' contribution rights in their own earlier consent decree; and the government had assured the First PRPs during litigation with the Second PRPs that such a settlement would not occur); *Nat'l Wildlife Fed'n v. Burford*, 878 F.2d 422 (D.C. Cir. 1989), *rev'd on other grounds, sub nom. Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990)) (not a CERCLA case; company's intervention in an environmental organization's active suit against the Department of Interior was timely because company moved to intervene less than three months after it was notified of a decision in the case that rendered certain of its mining claims null and void); *Reich*, 64 F.3d at 320–23 (not a CERCLA case; employees' intervention in active litigation in a government labor act violation case against their employer was timely because employer had lied to employees about representing them in the litigation); *United States v. City of Chicago*, 870 F.2d 1256 (7th Cir. 1989) (not a CERCLA case; white police officers' intervention in a longstanding discrimination case was timely because they moved to intervene 46 days after the lower court issued a ruling that appeared to discriminate against them); *South v. Rowe*, 759 F.2d 610 (7th Cir. 1985) (not a CERCLA case; prison inmate's intervention to enforce a consent decree to which he was a third-party beneficiary was timely because it was brought during the pendency of the consent decree and within a month of learning of a violation of the consent decree).

obtained judgment in this case." Cherry Op. at 6. As Judge Cherry stated: "*This case was closed over two years ago.*" *Id.* (emphasis added).

In those intervening years, EPA and the Settling Defendants have been implementing the requirements of the Consent Decree. EPA has taken thousands of samples from yards, US Oppos. Exh. D (Alcamo Dec.) at ¶ 19; thirty-eight properties were cleaned up last fall under the Consent Decree, Ballotti Dec. at ¶ 80; at least 212 more properties will be cleaned up in 2017 and 2018. *Id.* at ¶ 121. Settling Defendants have provided the funding for these activities and have transported and disposed of the contaminated soil generated by the cleanup. *Id.* at ¶ 18. Given the work already completed under the Consent Decree and scheduled through 2018, as well as the substantial payments Settling Defendants have already made into a special account created by the Consent Decree to fund the work, Applicants' suggestion that the parties would not be prejudiced by intervention at this late date, Applicants' Objection at 7–10, is without merit.

Because Applicants recognize this obvious fact, their Objection to Judge Cherry's opinion (as well as their earlier Reply Brief) rests on identifying actions that *might potentially* happen in the future: EPA might change the remedy for the West Calumet Housing Complex ("WCHC"), Applicants' Oppos. at 9; the future land use of the WCHC might change, *id.*; ATSDR's pending Health Assessment might change the basis of the clean-up, *id.* at 10; a groundwater study might change the remedy, *id.*; and a modification of the Consent Decree might happen. *Id.* at 3, 9, 10.

Of course, none of these actions actually have happened. Only one of them would involve activity in this forum: a modification of the Consent Decree. If a material modification of the Consent Decree were to occur, Applicants would have the opportunity to comment upon

it. 42 U.S.C. § 9622(d)(2). Likewise, if EPA were fundamentally to change the remedy for the WCHC, Applicants would have an opportunity to comment upon it.[7] *Id.* § 9617(a).

C. Judge Cherry Properly Found that Denying Applicants' Motion Would Not Prejudice Them and that No Unusual Circumstances Warranted Intervention

Citing binding Seventh Circuit precedent, Judge Cherry noted that "'it is difficult to understand why [Applicants] should be allowed to intervene in the present case for the purpose of presenting [their] views on the consent decree to the court after [they] had already been afforded an opportunity to do so.'" Cherry Op. at 7, citing *City of Bloomington*, 824 F.2d at 537 (brackets in original). Similarly, it is difficult to understand why Applicants should be allowed to present their views on a final agency decision that was issued four and a half years ago after they likewise had an opportunity to comment at that time. Courts regularly have found no prejudice to potential intervenors when they had an earlier opportunity to comment. *See* US Oppos. at 15 (listing the cases).

Finally, Judge Cherry found that no unusual circumstances warranted intervention here. Cherry Op. at 7. Indeed, circumstances actually weigh in favor of denying the Motion because "permitting intervention could endanger public health." *Id.* at 7.

II. APPLICANTS' ASSERTION THAT THEIR REQUESTED RELIEF IS ONLY "FORWARD LOOKING" IS NOT BASED ON THE RECORD

In their Reply Brief and Objection to Judge Cherry's opinion, Applicants now claim that the relief they seek is about "participat[ing] in the remediation process *going forward*."

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[7] EPA never has suggested that it was reconsidering or revising the remedy selected in the 2012 ROD for Zones 2 and 3 of the Calumet neighborhood. Status Report (ECF #11) at 4–5 (identifying reexamination of the remedy only for the WCHC). Indeed, EPA is in the process of cleaning up Zones 2 and 3 consistent with the 2012 Record of Decision. Ballotti Dec. at ¶¶ 25 (Zone 3), 80 (Zone 3), 81 (Zone 2), 120 (Zone 2), 121 (Zone 3). Applicants' claim that a March 16, 2017 Administrative Settlement Agreement and Order on Consent "altered the remedy and costs for Zone 3" is without merit. Applicants' Objection at 9. That Agreement provides funding for removal, not remedial, activities in Zone 3. Applicants' Objection at Exhibit A at ¶¶ 10.l–u; *id.* at Section VIII.

Applicants' Reply Brief at 14; Applicants' Objection at 10 (Applicants' focus is "on the future"). The only matter before this Court, however, is Applicants' Motion. In that Motion, Applicants seek relief related to the remedy selected by EPA, the Consent Decree, and EPA remedial actions. *See infra* at 3; Applicants' Motion at 4. While the untimeliness of Applicants' Motion renders Applicants' shift in position understandable, it does not change the fact that Applicants filed their Motion two years after this case was closed and became inactive.

However, even in their Reply Brief and Objection, Applicants are not focused exclusively on the future. Applicants "*request appropriate remediation* based on information only recently discovered and disclosed by EPA." Applicants' Reply Brief at 7 (emphasis added). In other words, Applicants want this Court to revisit and revise EPA's 2012 remedy.

Similarly, Applicants continue to question the Consent Decree's coverage of less than the entire residential neighborhood of this Site. Applicants' Reply Brief at 9–10; Applicants' Objection at 6–7. The United States already has explained that this is not unusual and does not represent a change in the remedy.[8] US Oppos. at 15–16.

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[8] Other examples of Region 5 Superfund settlements where consent decrees call for the remediation of only a portion of an area covered by a Record of Decision include two settlements involving the Lower Fox River and Green Bay Site in Green Bay, Wisconsin, and two settlements involving the Ashland/Northern States Power Lakefront Superfund Site in Ashland, Wisconsin. *See United States, et al. v. P.H. Glatfelter Co., et al.*, Civil No. 2:03-C-0949 (E.D. Wisc.), ECF ##4, 22, 35, 37 (*Original Consent Decree for Remedial Design and Remedial Action at Operable Unit 1 of the Lower Fox River and Green Bay Site* (ECF #4) *and Order Approving It* (ECF #22, April 12, 2004); *Amended Consent Decree* (ECF #35) *and Order Approving It* (ECF #37, August 13, 2008)) (ROD and Amended ROD covered two upper-most geographic areas of site but Consent Decree and Amended Consent Decree covered only one of them); *United States, et. al v. NCR Corp., et al.*, Civil No. 2:06-cv-00484-LA (E.D. Wisc.), ECF ##2, 8 (*Consent Decree for Performance of Phase I of the Remedial Action in Operable Units 2–5 of the Lower Fox River and Green Bay Site* (ECF #2) *and Order Approving It* (ECF #8, Nov. 3, 2006)) (ROD covered Operable Units 3, 4, and 5, but consent decree covered only one area of intense contamination in Operable Unit 4, known as the "Phase I Project Area"); *United States, et al. v. Northern States Power Co.*, Civil No. 12-cv-565, ECF #11 (W.D. Wisc.) (Opinion and Order) at 2 (Oct. 19, 2012) ("The consent decree [ECF ##2-1 through 2-2] resolves only the on-land contamination and leaves for further negotiation the cleanup of the bay waters"); *id.*, Civil No. 17-cv-16, ECF #2-1 (*Consent Decree between the United States, Wisconsin, and Northern States Power Company*) (approved March 1, 2017) at ¶¶ I.I–J (one ROD covers four inter-related areas of concern: three were addressed by the Phase 1 consent decree approved on October 19, 2012; the fourth was addressed by this consent decree).

So, while Applicants have tried to re-formulate their requested relief as "forward-looking," they have, for the most part, merely repackaged their original claims. As Judge Cherry properly found in rejecting Applicants' purported forward-looking shift, "it is foreseeable that allowing Applicants to intervene would cause delays in the processes going forward as the EPA continues its clean-up." Cherry Op. at 6-7.

To the extent Applicants seek to "[o]ffer their voice" to plan changes and new plans that occur in the future, Applicants' Reply Brief at 7, they will be able to do so by virtue of CERCLA itself. 42 U.S.C. §§ 9617(a) (public comment on remedy selection), 9622(d)(2) (public comment on judicial consent decrees). Moreover, they can speak to EPA directly by means of the multiple methods for securing input that EPA has established. *See* Attachment 1. This closed, inactive case is not the appropriate forum.

III. EVEN IF THIS COURT WERE TO FIND APPLICANTS' MOTION TIMELY, THE MOTION SHOULD BE DENIED BECAUSE, AT THIS TIME, CERCLA SECTION 113(h) BARS REVIEW OF THE RELIEF APPLICANTS SEEK

Judge Cherry's Opinion appears to hold that, as a threshold issue of subject matter jurisdiction, the United States' CERCLA Section 107 complaint, 42 U.S.C. § 9607, conferred jurisdiction over Applicants' Motion pursuant to CERCLA Section 113(h)(1), 42 U.S.C. § 9613(h)(1). Cherry Op. at 2–3. This ruling addresses an issue not raised in the United States' Opposition: we did not contest the Court's subject matter jurisdiction. Instead, we argued that Section 113(h) presently *bars the relief* Applicants seek. US Oppos. at 22–23 (emphasis added).

This Court need not reach the issues presented by Section 113(h) because untimeliness is a sufficient grounds for denying Applicants' Motion. If, however, the Court chooses to reach it, it should hold that judicial review of Applicants' challenges to EPA's remedial action is barred at this time.

Under Section 113(h), "[n]o federal court shall have jurisdiction . . . to review any challenges to removal or remedial action" except in five circumstances. Seventh Circuit case law is "in tension as to whether [Section 113(h)'s] prohibition is jurisdictional or not." *Frey v. EPA*, 751 F.3d 461, 466 (7th Cir. 2014) ("*Frey III*"). In its original 2001 *Frey* decision, the Seventh Circuit held that Section 113(h) was "not strictly speaking, a problem of 'subject matter jurisdiction' in the sense of the federal court's competence under Article III. It is instead a question about the prerequisites that the plaintiffs must satisfy to obtain relief." *Frey v. EPA*, 270 F.3d 1129, 1132 (7th Cir. 2001) ("*Frey I*") (internal citation omitted) ("the court's power to adjudicate the case is clear, and a dismissal should be predicated on [FRCP] 12(b)(6) not on 12(b)(1)"). In its *Frey III* decision, the Seventh Circuit continued to treat Section 113(h) as "substantive," not jurisdictional, but noted other contradictory Seventh Circuit cases. *Frey III*, 751 F.3d at 466.

The Court need not attempt to resolve this "tension" in the Seventh Circuit case law because regardless of whether Section 113(h) is concerned with subject matter jurisdiction or not, the result is the same. If Section 113(h) deprives the Court of subject matter jurisdiction, Applicants' Motion must be denied. If it does not, Applicants' Motion must be denied as untimely and/or because the relief Applicants seek is barred at this time by Section 113(h).[9]

Congress carefully circumscribed the timing of judicial review of challenges to EPA remedial actions. Under a heading styled "Timing of Review," Section 113(h) provides in relevant part:

> (h) No Federal court shall have jurisdiction . . . to review *any challenges to* removal or *remedial action selected under section 9604* of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following:

[9] If judicial review were permitted at this time (which it is not), it would be limited to the administrative record, 42 U.S.C. § 9613(j)(1), on an "arbitrary and capricious" standard of review. *Id.* § 9613(j)(3).

> (1) An action under section 9607 of this title to recover response costs or damages or for contribution.
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> . . . .
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> (4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter.

42 U.S.C. § 9613(h) (emphasis added).[10]

The Applicants ultimately seek to "challenge[] . . . remedial action selected under section 9604." The Seventh Circuit broadly interprets a "challenge to remedial action" under Section 113(h): "'A suit challenges a remedial action within the meaning of 113(h) *if it interferes with the implementation of a CERCLA remedy.*'" *Pollack*, 507 F.3d at 526 (emphasis added) (quoting *Broward Gardens Tenants Ass'n v. EPA,* 311 F.3d 1066, 1072 (11th Cir. 2002)). Here Applicants ask this Court to review and revise: (1) EPA's remediation plan to "ensure it adequately protects human health and the environment;" and (2) EPA's ongoing remedial actions to ensure EPA "adequately protects all residents from hazardous exposure." Applicants' Motion at 4. Manifestly, judicial review at this time would "interfere with" EPA's ongoing and active cleanup of the Calumet neighborhood. Neither of Section 113(h)'s exceptions applies here, so judicial review is barred at this time.

Section 113(h)(4) does not lift the bar on judicial review at this time. Instead, it provides citizens with an opportunity for review of EPA remedial actions only *after* the remedial action has been completed.[11] "'Congress apparently concluded that delays caused by citizen suit

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[10] The types of claims arising under the exceptions in Subsections 113(h)(2), (3), and (5) of CERCLA, 42 U.S.C. §§ 9613(h)(2), (3), and (5), indisputably have not occurred in this case.

[11] *Frey III,* 751 F.3d at 467 ("Section 113(h)(4) prevents court consideration of citizen suits under CERCLA until a remedial action is complete"); *Pollack*, 507 F.3d at 525 ("the upshot of § 113(h) is that private attorneys general must wait until a cleanup is finished before rushing to court"); *Schalk v. Reilly,* 900 F.2d 1091, 1095

challenges posed a greater risk to the public welfare than the risk of EPA error in the selection of methods of remediation.'" *Pollack*, 507 F.3d at 525, (quoting *Clinton County Comm'rs v. EPA*, 116 F.3d 1018, 1025 (3rd Cir. 1997) (en banc)).

Section 113(h)(1) is not available to Applicants because they are not potentially responsible parties. Section 113(h)(1) provides potentially responsible parties with an opportunity to challenge EPA remedial actions after a Section 107 suit is filed against them. Congress allowed such challenges under this circumstance in order to afford due process to parties who are being sued to pay for a cleanup. Without Section 113(h)(1), they would have no opportunity to challenge the remedy. *See North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1245 (7th Cir. 1991) (explaining that responsible party gets its right of review of final agency action either under Section 113(h)(1) (*i.e.*, when Section 107 enforcement or contribution suits are filed) or under Section 113(h)(3) (*i.e.* when Section 106(b) claims for reimbursement are filed); citizens get their rights by virtue of Section 113(h)(4)); *United States v. NL Indust., Inc.*, 936 F. Supp. 545, 551–52 (S.D. Ill. 1996). The legislative history of Section 113(h) affirms Section 113(h)(1)'s applicability to potentially responsible parties. H.R. Rep. No. 99-253, pt. 3, at 21–22; 1985 WL 25941, **3038, 3044–45 (Oct. 30, 1985) (emphasis added) ("Generally, this subsection precludes judicial review of EPA's selection of a response action, except in four limited cases: first, when the agency seeks to enforce its decisions against a *responsible party*. . . ").

Even if Section 113(h)(1) could be interpreted to allow a citizen suit cloaked as an intervention motion in a Section 107 action enforcement action against responsible parties, it

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(7th Cir. 1990) ("The obvious meaning of this statute is that when a remedy has been selected, no challenge to the cleanup may occur prior to completion of the remedy.")

does not permit it in this case. There is no current "action under section 107" as that phrase is used in Section 113(h)(1). There *was* an action under Section 107, but it ended and the case was closed.[12]

CONCLUSION

For the reasons stated herein and in our Opposition to Applicants' Motion to Intervene (ECF #24), the United States respectfully requests this Court to deny Applicants' Motion.

Respectfully Submitted,

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[12] In addition, there never was a Section 107 cost recovery action relating to Zone 2. Because the settlement secured relief only with respect to Zones 1 and 3, the complaint asserted claims only in those two Zones. Complaint (ECF #1) at ¶¶ 19 and 21. Consistent with that, the United States covenanted not to sue Settling Defendants only for Zones 1 and 3, Consent Decree (ECF #8) at ¶ 73, and reserved its rights with respect to Zone 2. *Id.* at ¶ 74.j. Therefore, any relief Applicants seek with respect to Zone 2 is additionally barred because the complaint never asserted a Section 107 action for cost recovery for Zone 2.

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CERTIFICATE OF SERVICE

I, Annette M. Lang, electronically filed the foregoing **UNITED STATES' OPPOSITION TO APPLICANTS' OBJECTION TO MAGISTRATE'S OPINION AND ORDER** with the Clerk of Court using the CM/ECF system.

I certify that on this 14th day of June 2017, I also caused a true copy of the foregoing to be served by first-class mail, postage pre-paid, on the following counsel who are not identified in the Court's CM/ECF system:

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s/ Annette M. Lang
Annette M. Lang

ATTACHMENT 1

EPA Press Release, EPA Enhances Communication with East Chicago Residents (May 31, 2017)

News Releases from Headquarters

EPA Enhances Communication with East Chicago Residents

05/31/2017

Contact Information:
U.S. EPA Media Relations (press@epa.gov)

EAST CHICAGO – Following U.S. Environmental Protection Agency Administrator Scott Pruitt's visit to the USS Lead Superfund site last month, EPA is taking steps to enhance communication and provide better service to East Chicago residents. This includes designating a community involvement coordinator to serve as a dedicated point of contact for East Chicago residents; monthly community meetings with EPA; and coordination with the East Chicago/Calumet Coalition Community Advisory Group and other community organizations as cleanup continues.

"When I met with East Chicago residents, I heard their issues first-hand and vowed to help correct these problems," **said Administrator Pruitt.** "I am making it a priority to ensure contaminated sites get cleaned up. We will take a more hands-on approach to ensure proper oversight and attention to the Superfund program at the highest levels of the Agency."

"As Administrator Pruitt highlighted during his visit to East Chicago last month, collaboration between the EPA, the State and local East Chicago leaders is critical to addressing past issues on this Superfund site," **Indiana Governor Eric J. Holcomb said.** "I thank the Administrator for taking these important steps and for demonstrating his continued commitment to Hoosiers in northwest Indiana."

"Administrator Pruitt recognized that the USS Lead Superfund site was important enough to serve as the first Superfund site that he visited. His continued attention is appreciated. This should be the standard at all sites where residents are exposed to hazardous contamination," **said East Chicago resident Maritza Lopez,** who met with Administrator Pruitt when he visited the USS Lead Superfund site.

EPA is taking the following steps to enhance communication with East Chicago residents:

•Provide a dedicated, experienced community involvement coordinator as a direct point of contact for all residents with questions and concerns;

•Publicize the hotline number (219-801-2199), available to residents during business hours;

•Host monthly community meetings to provide updates and answer questions from residents;

•Maintain an EPA presence at the Carrie Gosch Elementary School so residents can easily stop in and speak to EPA employees;

•Track all resident inquiries in a database to ensure responses are provided in a timely manner;

•Continue to meet regularly with local, state and federal partners to keep officials apprised of EPA's work and data collection in the community; and

•Regularly update the USS Lead Superfund website and add frequently asked questions.

For more information, please visit: https://www.epa.gov/uss-lead-superfund-site

R101

LAST UPDATED ON MAY 31, 2017